Harmony Teamwork Construction Sdn Bhd v Vital Talent Sdn Bhd

HIGH COURT (GEORGETOWN) — ORIGINATING SUMMONS NO PA-24NCVC-1207–12 OF 2016
LIM CHONG FONG J
3 APRIL 2017

Building and Construction Law — Construction contracts — Adjudication of payment disputes — Defendant appointed plaintiff as subcontractor — Disputes arose over non-payment of progress claim and release of retention money — Plaintiff referred matter to adjudicator — Adjudicator decided in favour of plaintiff — Defendant only made part-payment based on adjudication decision — Plaintiff made application to enforce adjudication decision pursuant to s 28 of the Construction Industry Payment and Adjudication Act 2012 — Whether plaintiff entitled to apply to court for order to register and enforce adjudication decision in view of part-payment made by defendant — Construction Industry Payment and Adjudication Act 2012 ss 12(6), 28(1) & (3) — Rules of Court 2012 O 46 rr 3(1) & (2)(a)

The defendant appointed the plaintiff as a subcontractor for a construction project. Upon the completion of the work, there were disputes arose between the parties over the non-payment of a progress claim and release of retention money under the subcontract. Consequently, the plaintiff referred the matters to the adjudicator. The adjudicator decided in favour of the plaintiff and based on the adjudication decisions, the plaintiff demanded RM80,775.74. However, the defendant only paid RM76,357.72 and refused to pay the remaining RM4,418.38. In response, the plaintiff brought the present action pursuant to s 28 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') for an order to register and enforce the decision of the adjudicator made under the CIPAA. The sole issue for court's decision was whether the plaintiff was entitled to apply to court for an order to register and enforce the adjudication decision in the terms as set out in the adjudication decision in view that the defendant had already substantially paid the plaintiff after the adjudication decision had been served pursuant to s 12(6) of the CIPAA.

Held, allowing the plaintiff's application:

(1) The payment made by the defendant to the plaintiff ought not to be reflected and accounted for in the order made pursuant to the application under s 28(1) of the CIPAA but only later in an application made for enforcement of the adjudication decision pursuant to s 28(3) of the

CIPAA. This was fortified by the provision in O 46 rr 3(1) and (2)(a) of the Rules of Court 2012. Therefore, the plaintiff would not double recover or be unjustly enriched notwithstanding that an order was made to register the adjudication decision as a judgment in terms of the adjudication decision (see paras 18–19).

[Bahasa Malaysia summary

Defendan telah melantik plaintif sebagai subkotraktor untuk projek pembinaan. Setelah siap kerja tersebut, terdapat pertikaian yang timbul antara pihak-pihak berhubung tiada bayaran untuk tuntutan pelaksanaan dan pelepasan wang pengekalan di bawah subkontrak. Berikutan itu, plaintif telah merujuk perkara tersebut kepada adjudikator. Adjudikator telah membuat keputusan yang menyebelahi plaintif dan berdasarkan keputusan adjudikasi, plaintif telah menuntut RM80,775.74. Walau bagaimanapun, defendan hanya membayar RM76,357.72 dan enggan membayar baki RM4,418.38. Sebagai tindak balas, plaintif telah memulakan tindakan ini menurut s 28 Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP') untuk perintah mendaftar dan menguatkuasakan keputusan adjudikator yang dibuat di bawah APAIP. Satu-satunya isu untuk keputusan mahkamah adalah sama ada plaintif berhak memohon kepada mahkamah ini untuk perintah bagi mendaftar dan menguatkuasakan keputusan adjudikasi itu dalam terma-terma sepertimana dinyatakan dalam keputusan adjudikasi itu berdasarkan bahawa defendan telahpun banyak membayar plaintif selepas keputusan adjudikasi itu disampaikan menurut s 12(6) APAIP.

Diputuskan, membenarkan permohonan plaintif:

(1) Pembayaran yang dibuat oleh defendan kepada plaintif tidak patut mebayangkan dan diambil kira dalam perintah yang dibuat menurut permohonan di bawah s 28(1) APAIP tetapi hanya kemudian dalam permohonan yang dibuat untuk penguatkuasaan keputusan adjudikasi menurut s 28(3) APAIP. Ini diperkuatkan oleh peruntukan dalam A 46 kk 3(1) dan (2)(a) Kaedah-Kaedah Mahkamah 2012. Oleh itu, plaintif tidak boleh mendapat balik secara berganda atau diperkaya secara tidak adil walaupun suatu perintah dibuat untuk mendaftar keputusan adjudikasi sebagai penghakiman mengikut terma keputusan adjudikasi itu (lihat perenggan 18–19).]

Notes

For a case on sonstruction contracts in general, see 1(3) *Mallal's Digest* (5th Ed, 2015) para 4052.

Cases referred to

Mammoth Empire Construction Sdn Bhd v Lifomax Woodbuild Sdn Bhd [2017] 1 MLJ 453, CA (distd)

PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd and other suits [2017] MLJU 905, HC (refd)

Legislation referred to

Rules of Court 2012 O 46, O 46 r 3(1), (2)(a), O 49, O 49 r 2(a)
Construction Industry Payment and Adjudication Act 2012 ss 12(6), 15, 28, 28(1), (2), (3)

Lee Kheng Hong (Allen & Assoc) for the plaintiff.
Tan Chi Sian (PY Hoh & Tai) for the defendant.

Lim Chong Fong J:

INTRODUCTION

[1] This is an originating summons brought by the plaintiff dated 27 December 2016 ('OS') for an order to register and enforce the decision of the adjudicator made under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA').

[2] The plaintiff and the defendant are both private limited companies involved in construction business.

[3] The affidavits that were filed for purposes of this OS are as follows:

(a) the plaintiff's affidavit in support of Loh Chung Kiat affirmed on 23 December 2016;

(b) the defendant's affidavit in reply of Chu Yoke Loong affirmed on 3 February 2017; and

(c) the plaintiff's affidavit in reply of Loh Chung Kiat affirmed on 13 February 2017.

[4] After having read the written submission filed by parties and hearing counsel on 21 March 2017, I allowed the application with costs of RM2,500.

[5] I now furnish below the grounds of my decision.

SALIENT FACTS

[6] The plaintiff was appointed by the defendant as its subcontractor for the construction of the retaining wall of a housing project on Lots 11784 and 10285, Mukim 13, Daerah Timur Laut, Jalan Sultan Azlan Shah, Penang.

[7] Upon completion of the work, there were disputes that arose between them over the non-payment of a progress claim and release of retention money under the subcontract.

[8] As the result, the plaintiff referred the disputes to statutory adjudication under the CIPAA.

[9] The appointed adjudicator Sr Saravanan Subramaniam made the following decision on 5 December 2016 ('adjudication decision'):

> I determine that:
>
> (a) The Respondent shall pay the Claimant the sum of RM66,275.72. This is hereby recorded as the Adjudicated Sum.
>
> (b) The adjudicated sum shall be paid on or before 16 December 2016 and shall henceforth be called the Due date for Payment of the Adjudicated Sum.
>
> (c) The rate of interest payable is 4% per annum simple interest from 12 April 2015 until payment of the Adjudicated Sum.
>
> (d) The Respondent shall bear 100% of the costs of the adjudication. These costs include RM9,302.64 cost of the adjudicator and KLRCA's fees (inclusive of GST).

[10] Subsequently the plaintiff demanded for RM80,775.74 as decided but the defendant only paid the sum of RM76,357.72 to the plaintiff on 28 December 2016 which the plaintiff has accepted on a without prejudice basis. There is still the sum of RM4,418.38 due and owing to the plaintiff as at 17 December 2016.

[11] The plaintiff consequently filed this OS.

CONTENTION AND FINDINGS

[12] The CIPAA is nowadays widely and heavily resorted to provide swift dispute resolution and relief to unpaid construction industry claimants for work done. This is yet another instance. The sole issue here in this OS is whether the plaintiff is entitled to apply to court for an order to register and enforce the adjudication decision in the terms as set out in the adjudication decision in view that the defendant has already substantially paid the plaintiff after the adjudication decision has been served pursuant to s 12(6) of the CIPAA.

[13] In this regard, it is necessary to refer to s 28 of the CIPAA which reads:

> 28 Enforcement of adjudication decisions as judgment

(1) A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.

(2) The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable.

(3) The order made under subsection (2) may be executed in accordance with the rules on execution of the orders or judgment of the High Court.

[14] The plaintiff contended before me that this is a straightforward case of registering the adjudication decision as a court judgment on like terms since the defendant did not challenge the adjudication decision.

[15] The defendant however contended that the order, if any, must be for the reduced amount now owing to the plaintiff to reflect and account for the payment made by the defendant to the plaintiff. In support of this contention, the defendant relied on the Court of Appeal case of *Mammoth Empire Construction Sdn Bhd v Lifomax Woodbuild Sdn Bhd* [2017] 1 MLJ 453.

[16] From my reading of s 28 of the CIPAA, the enforcement of an adjudication decision is a two stage process. Firstly the successful party must make an application to the High Court for an order to enforce the adjudication decision pursuant to s 28(1). Implicit therein, the application should include an order that judgment be entered in terms of the adjudication decision. Thereafter and secondly, the successful party may pursuant to s 28(3) enforce the judgment based on the modes of execution prescribed by the Rules of Court 2012 such as through writs of execution (O 46), garnishee proceedings (O 49), etc.

[17] I am aware that s 28(2) of the CIPAA provides that the order made pursuant to the s 28(1) application may be made in respect of the whole or part of the adjudication decision. I am however of the view that the order for enforcement in part pursuant to s 28(2) is only applicable where part of that adjudication decision has been set aside pursuant to s 15 of the CIPAA by reason that it was improperly procured or otherwise adjusted as in *PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd and other suits* [2017] MLJU 905.

[18] I have carefully read the Court of Appeal case of *Mammoth Empire Construction Sdn Bhd v Lifomax Woodbuild Sdn Bhd* relied by the defendant but do not find it to be of assistance to advance the defendant's proposition. It is not a CIPAA case and it concerned a trial wherein the plaintiff was restricted to the specified sum as pleaded because there was no prayer for 'such other sum as may

be found due' or for 'the court to order assessment'. My view is that the payment made by the defendant to the plaintiff ought not to be reflected and accounted for in the order made pursuant to the application under s 28(1) but only later in an application made for enforcement of the adjudication decision pursuant to s 28(3) of the CIPAA. In this respect, I am fortified by the provision in say O 46 r 3(1) and (2)(a) of the Rules of Court 2012 which reads with emphasis added by me:

> (1) An application for leave to issue writ of execution may be made ex-parte by notice of application in Form 88.
>
> (2) Such an application shall be supported by an affidavit —
>
> (a) identifying the judgment or order of which the application relates and, if the judgment or order is for payment of money, *stating the amount originally due thereunder and the amount due thereunder at the date of application;*
>
> ...

Likewise O 49 r 2(a) of the Rules of Court 2012 reads with emphasis added by me:

> 2 An application for an order under rule 1 shall be made ex-parte by a notice of application supported by an affidavit in Form 98 —
>
> (a) identifying the judgment or order to be enforced and *stating the amount remaining unpaid* under it at the time of the application; and
>
> ...

[19] It is therefore plain that the plaintiff will not double recover or be unjustly enriched notwithstanding that an order is made to register the adjudication decision as a judgment in terms of the adjudication decision here.

CONCLUSION

[20] It for the foregoing reasons that I therefore allowed the plaintiff's application as so ordered.

Plaintiff's application allowed.

Reported by Dzulqarnain Ab Fatar